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COURT OF CRIMINAL APPEALS
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APPELLATE COURT CAUSE NO. 03-17-00803-CR

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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

THE STATE OF TEXAS,
Appellant (Appellee below)

VS.

MICHAEL JOSEPH TILGHMAN,
Appellee (Appellant below)

STATE'S BRIEF ON ITS PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT AT AUSTIN

ORIGINAL APPEAL FROM THE 274TH JUDICIAL DISTRICT COURT,

HAYS COUNTY, TEXAS, TRIAL COURT CAUSE NO. CR-16-1126

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NAMES OF PARTIES

Appellee:	State of Texas
Attorneys for the State:	Wesley H. Mau, Criminal District Attorney
At trial:	Michael McCarthy, Assistant Criminal District Attorney
On appeal:	Wesley H. Mau, Criminal District Attorney Michael McCarthy, Assistant Criminal District Attorney 712 South Stagecoach Trail, Suite 2057 San Marcos, Texas 78666 State Bar No. 24065704 Attorneys for the State of Texas
Appellant:	Michael Joseph Tilghman
Appellant's Attorney:	
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Trial Judge:	Honorable Gary Steel The 274th Judicial District Court, Hays County 712 Stagecoach Trail, Suite 3240 San Marcos, Texas 78666

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TO THE HONORABLE COURT OF CRIMINAL APPEALS JUDGES:

COMES NOW the State of Texas, by and through her Assistant Criminal District Attorney, Michael McCarthy, and files this Brief on the State's Petition for Discretionary Review pursuant to TEX.R.APP.PROC. Rule 68.1 and would show the Court the following:

STATEMENT OF THE CASE

Appellee was indicted for Possession of a Controlled Substance with Intent to Deliver on December 21, 2016. (C.R. 4). Appellee filed a motion to suppress on September 17, 2017. (C.R. 5). The Court heard evidence and argument related to Appellee's motion to suppress on October 12, 2017. (2 R.R. 1). That same day, the trial court entered an order denying Appellee's motion to suppress. (C.R. at 7-8). The State and Defendant subsequently entered into a plea bargain. Appellee pled guilty. The State waived a punishment enhancement paragraph and the Appellee was sentenced to two years in the Texas Department of Criminal Justice's Institutional Division. (C.R. at 16-24). Pursuant to the plea agreement, Appellant preserved his right of appeal (C.R. at 15; 3 R.R. 9-10).

STATEMENT OF PROCEDURAL HISTORY

On June 7, 2019, a three-justice panel in the Third Court of Appeals reversed the conviction in a published opinion, holding that the district court erred by abusing its discretion in denying Tilghman's motion to suppress. Justice Chari Kelly issued a

published dissent. The State did not file a Motion for Rehearing. The Stated filed a Petition for Discretionary Review ("PDR") on July 3rd, 2019. This Court granted the State's PDR on September 11th, 2019. This brief on the merits is timely filed on or before October 11, 2019. Tex. R. App. P. 70.1

ISSUE PRESENTED

The Third Court of Appeals majority erred when it ruled that Appellant maintained a reasonable expectation of privacy that was violated by police when they were executing a lawful eviction at the hotel staff's request.

STATEMENT OF FACTS

Michael Joseph Tilghman ("Appellee") and two co-defendants were staying at the Fairfield Marriot in San Marcos, Texas on October 14, 2016. (2 R.R. 13-17; 33-36). Hotel staff had smelled marijuana coming from Appellee's room. Hotel staff began eviction steps pursuant to a company policy that required eviction of guests engaging in criminal activity in their rooms. (2 R.R. 34-37). Hotel staff knocked on Appellee's door to alert him that he was being evicted. (2 R.R. 35). Appellee did not come to the door or answer those attempts. (2 R.R. 35). Hotel staff then called law enforcement to help evict Appellee and his co-defendants. (2 R.R. 17, 35-36). After San Marcos Police Department ("SMPD") officers responded and contacted hotel management, they proceeded to contact Appellee and his co-defendants by knocking on the door to their room. (2 R.R. 15, 40-41). Neither Appellant nor his co-Defendants

responded to those audible and persistent attempts to get them to open the door. (2 R.R. 15-16, 40-41, State's Exhibit #1 at 5:34-6:23). SMPD Officer Daniel Duckworth ("Officer Duckworth") heard the rooms' occupants whispering inside as officers knocked and awaited a response. (2 R.R at 16). Shortly thereafter, hotel manager Joshua Chapman keyed the lock open and Officer Duckworth opened the door, making contact with Appellee and his co-defendants. (2 R.R. 16-19, 41). Officers then made entry to effect the eviction and soon observed narcotics in plain view. (2 R.R. 19, 22-23).

SUMMARY OF THE ARGUMENT

Tilghman v. State[1] misapplies *Stoner v. California* and decided that Appellant still had a reasonable expectation of privacy in his hotel room despite his eviction. This ruling conflicts with prior Texas cases, other States' rulings on the same issue, and Federal cases holding that a hotel occupant loses his reasonable expectation of privacy upon being evicted. *See Brimage v. State*, 918 S.W.2d 466 (Tex. Crim. App. 1996) (op. on reh'g); *Voelkel v. State*, 717 S.W.2d 314 (Tex. Crim. App. 1986); *United States v. Peoples*, 854 F.3d 993 (8th Cir. 2017); *United States v. Tolbert*, 613 Fed. Appx. 548 (7th Cir. 2015); *United States v. Bass*, 41 Fed. Appx. 735 (6th Cir. 2002); *United States v. Banks*, 262 Fed Appx. 900 (10th Cir. 2008); *United States v. Haddad*, 558 F.2d 968

[1] *Tilghman v. State*, 576 S.W.3d 449 (Tex. App.—Austin June 7, 2019) citing to *Stoner v. California* 376 U.S. 483, 84 S. Ct. 889, 11 L.Ed.2d 856 (1964).

(9th Cir. 1977); *People v. Hardy*, 77 A.D.3d 133, 907 N.Y.S.2d 244 (N.Y. 2010); *Johnson v. State*, 285 Ga. 571, 679 S.E.2d 340 (2009); *Bordley v. State*, 205 Md. App. 692 (2012); *Commonwealth v. Molina*, 459 Mass. 819, 948 N.E.2d 402 (2011); *State v. Williams*, 2016 ND 132, 881 N.W.2d 618 (2016). The Third Court reversed Appellee's conviction, reversed the trial court's ruling denying the motion to suppress, and remanded to the trial court for further proceedings.

The Third Court distinguished binding precedent from Appellee's case by focusing on one constitutionally insignificant fact: that Appellee and his co-defendants' original occupancy term had not yet expired when hotel staff were alerted to potential criminal activity and decided to call the police to help evict the occupants. The Third Court then established eviction prerequisites not previously mandated by law: 1) a hotel must create eviction policies, 2) a hotel must promulgate eviction policies to guests; and 3) a hotel must provide eviction notice to occupants prior to effectuating eviction even when the hotel staff suspect ongoing criminal activity. These requirements are not found in any other law prior to the majority opinion in *Tilghman*, were not enacted by the legislature, and would produce absurd and overly burdensome results.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT POLICE COULD NOT LAWFULLY ENTER A HOTEL ROOM TO HELP A HOTEL MANAGER EVICT A GUEST ENGAGING IN CRIMINAL ACTIVITY.

In this case, police officers were summoned by a hotel manager to assist in evicting several hotel guests who had ignored previous attempts by the hotel staff to contact them in response to the marijuana smell emanating from their room. The Third Court of Appeals held that when the manager unlocked the door for the police to effectuate the eviction, the officers violated Appellee's Fourth Amendment rights.

1. The Third Court of Appeals' majority misapplied Stoner v. California.

The majority opinion in *Tilghman* relied upon *Stoner v. California*[2] in deciding Appellee had a reasonable expectation of privacy in the hotel room and that his Fourth Amendment rights were violated when the hotel manager entered only after Appellee and his guests refused to respond to attempts to contact them. *Tilghman v. State*, at 462.[3] In *Stoner*, police approached a hotel clerk and asked for permission to enter the room of a robbery suspect who was, at the time, not in the room. *Stoner*, 376 U.S. at 485, 84 S. Ct. at 890–91. The hotel clerk acquiesced, and the police entered and

[2] 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)

[3] Pinpoint cites to the Court of Appeals' decision reference the page numbers as they are assigned in the Westlaw online publication. (These numbers differ from those in the slip opinions found on the Court of Appeals' website, links to which may be found at http://search.txcourts.gov/Case.aspx?cn=03-17-00803-CR&coa=coa03.

searched the room, locating evidence that was later used at trial. *Id.*, 376 U.S. at 485–86, 84 S. Ct. at 891.

By contrast here, as Justice Kelly correctly observed in her dissent, "The officers in this case did not show up unannounced at the Marriott Fairfield Inn to arrest Tilghman for an offense. They were called solely to assist in evicting occupants for smoking marihuana, and the hotel staff did not seek their arrest." *Tilghman*, at 469 (Kelly, J., dissenting). The dissenting opinion distinguishes Appellee's facts from those presented in *Stoner*, noting "The officers in *Stoner*…were not summoned by hotel staff, nor were they asked to evict anyone." *Id.* Here, the officers' presence was solely due to the hotel manager's safety concerns, and in no measure by the officers' desire to search the room or investigate any alleged criminal offense. *Id.*

The majority below held that a hotel eviction does not diminish the hotel guest's reasonable expectation of privacy unless the occupancy term has expired first or the guest has notice of the eviction. *Id.* at 462. While conceding that Texas law permits a hotelier to evict a guest "without resort to legal process,"[4] the majority dismissed that fact by virtue of *Stoner*'s admonition that "the constitutional right to be free from unreasonable searches and seizures" should not be subject to considerations relating to property law. *Tilghman*, at FN5. But the majority overlooks that when the police

[4] *See Bertuca v. Martinez*, No. 04-04-00926-CV, 2006 WL 397904, at *2 (Tex. App.— San Antonio February 22, 2006, no pet.) (mem. op.).

entered Appellee's hotel room, no search or seizure was taking place. The two Justices ignored the critical distinction between *Stoner* and this case, which Justice Kelly correctly points out: 1) the police and the hotel manager were not there to arrest Appellee; they were there to evict him, and 2) as a result of his contemporaneous eviction, Appellee's occupancy right had, in fact, expired.

2. The majority opinion invents new rules that did not previously exist to support the idea that Appellee's occupancy term hadn't expired when he was evicted

To justify their holding that Appellee's privacy right in the hotel room had not been extinguished by the hotel staff's decision to evict him, the majority imposes requirements on Texas hoteliers to 1) create eviction policies, 2) promulgate eviction policies to guests; and 3) provide eviction notice to occupants prior to effectuating eviction. *Tilghman*, at 461-462. None of these three requirements previously existed prior to the majority's opinion. Justice Kelly explained:

> As both parties discussed in oral argument, there is no Texas law requiring hotels to follow any procedure for eviction. Further, our sister court has held no landlord-tenant relationship exists between a hotel and its guest. *Bertuca v. Martinez*, No. 04-04-00926-CV, 2006 Tex. App. LEXIS 1386, at *6 (Tex. App.— San Antonio February 22, 2006, no pet.) (mem. op.).
>
> > [A]n innkeeper has no duty to keep a guest indefinitely and has the right to evict a guest. 'When a guest is obnoxious for some reason, he may be forcibly removed without resort to legal process, provided no more force is used than necessary.'. . . There is no Texas law which, regardless of his conduct or behavior, allows a person to stay in a hotel room merely because the rate for the room has been paid.
>
> *Id*. (internal citations removed). Both parties agree that the hotel had a right to evict Tilghman at the time that the officers entered the room. Appellant's complaint, rather, is that officers had no authority to enter the room to effectuate

> the eviction. However, as the caselaw cited illustrates, this is not the law in Texas. *See Voelkel*,[5] 717 S.W.2d at 315-16 (recognizing that police officers requested by hotel staff can effectuate eviction). Further, it is not unreasonable for hotel staff to request officers be present, for safety concerns, when guests suspected of illegal activity are asked to leave the property.

Tilghman, at 471 (Kelly, J., dissenting). Justice Kelly concluded: "[A]bsent any law requiring that a guest must be put on notice that they could be evicted for illegal activity, I would not require notice here." *Id.* at 471-472.

3. The new rules would create confusion

In crafting these new eviction notice rules, the two Justices failed to clarify whether said eviction notice had to be actual or constructive and failed to explain what hotel eviction notice policies and efforts would be sufficient in order to overcome an obnoxious and/or felonious guest's reasonable expectation of privacy. All hotel occupants would need to do to thwart eviction is ignore hotel staff eviction notice attempts, as Appellee and his co-defendants did here. After all, hotel staff's efforts to contact Appellee (and similar efforts by police), including knocking on his door, were presumably inadequate to satisfy the two Justices' eviction notice requirements.

The majority's new eviction notice polices would put law enforcement responding to hotel disturbances in an untenable position. Before accompanying a hotel staff member to a room to effectuate an eviction, law enforcement would need to 1) confirm that the hotelier has complied with all of the new eviction notice policy

[5] *Voelkel v. State*, 717 S.W.2d 314 (Tex. Crim. App. 1986).

requirements and, if not, either 2) demonstrate probable cause to believe a crime is in progress, and 3) obtain a warrant or observe evidence that would obviate the need for warrant.

Hotel staff would face the Hobson's choice in the face of potentially illegal or dangerous hotel room activity: 1) do nothing at all, thus allowing illegal activity to continue that could endanger others guests, or 2) put their own safety at risk to evict potentially violent, dangerous, intoxicated and/or armed hotel guests.

Law enforcement would have a similar dilemma. When asked to assist in an eviction, they can refuse, ignoring the risks that a police presence would otherwise prevent. If they do agree to stand by, their presence might prevent some altercations, but all law enforcement would be permitted to do is stand outside of the room while averting their eyes so as to not violate the guests' reasonable privacy expectations.

4. The majority imposes rules the legislature has declined to enact

The majority's holding ignores other guiding Texas law. The Texas legislature has enacted rules for when an apartment manager may evict an obnoxious or problematic tenant. *See* Texas Property Code, Ch. 24. In contrast, the Texas Legislature has not so regulated when and how hoteliers may evict their tenants. The hotel eviction case law holding that a hotelier does not have to satisfy any legal

requirements before eviction has been in existence for 73 years.[6] Yet, two Justices now want impose rules on hoteliers that Texas Legislature has declined to impose. In so doing, these two Justices have exceeded their authority[7] while ignoring binding precedent.

5. The majority opinion ignores State and Federal precedents holding that a hotel guest's privacy rights expire when the occupancy term expires

As Justice Kelly points out in her dissent, this Court "has acknowledged that the expectation of privacy in a hotel is extinguished upon eviction. *Voelkel*, 717 S.W.2d at 315-16. Further, it is permissible for a police officer to help effectuate that eviction when requested by hotel staff. *Id.*" *Tilghman*, at 470 (Kelly, J. dissenting). Additionally, this court has recognized a clear right for hotel staff to consent to a search of a room after the tenancy expires. *Brimage*, 918 S.W.2d at 507. Justice Kelly explained that while Texas has not directly addressed contraband seizures from hotel occupants evicted for things other than overstaying their occupancy term, the *Peoples* and *Tolbert* Courts provided that analysis, post-*Stoner*, and ruled that defendants did not have reasonable privacy expectations. *Id.* at 470. Further, the majority conceded that a Federal appellate jurisdiction recognizes that a hotel occupant's expectation of privacy may be terminated by a lawful eviction, post-*Stoner*. *Tilghman*, at 460.

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[6] *See Bertuca*, citing to *McBride v. Hosey*, 197 S.W.2d 372, 375 (Tex. Civ. App. – El Paso, 1946, writ ref'd n.r.e)("It is consistently held that when the right to evict, *e. g.* when a guest is obnoxious for some reason he may be forcibly removed and without resort to legal process, provided no more force is used than is necessary.")

[7] *See*, Tex. Const. art. II, § 1

The majority attempts to distinguish *Peoples*, *Tolbert*, and *Bass* by claiming Appellant had not been evicted at the time officers made entry. *Tilghman* at 461; *See United States v. Bass*, 41 Fed. Appx. 735 (6th Cir. 2002). This assertion is unsupported by the suppression hearing record. (VOL2 R.R. at 13, 16-17, 35-36, 41; State's Exhibit #1 at 6:46). The facts in this case are extremely similar to those in *Peoples* and *Tolbert*, where the clerk handed the officer a key to enter the room and affect the eviction without any prior notice to the defendant and the officer entered the room using that key with only other officers accompanying him. *Peoples* at 995; *Tolbert* at 549. The *Peoples* court implicitly and *Tolbert* court explicitly both ruled that the eviction took effect the minute the hotel clerk handed the officers a key. *Peoples* at 996; *Tolbert* at 550-551.

The majority opinion, in ruling that Appellant had not been evicted, focused on the fact that his natural occupancy term had not yet expired. Yet a common sense review of the facts in both *Peoples* and *Tolbert* demonstrate the same was true in those cases. *Peoples* at 996-997 (discussing the need to rely upon an eviction statute, which would not be true if the term of occupancy had expired naturally); *Tolbert* at 549 (detailing the facts of the case which occurred all in the same night after a friend rented the room for Tolbert). These are not the only courts to review a similar situation where a hotel room's occupancy term had not naturally expired. *United States v. Banks*, 262 Fed. Appx. 900 (10th Cir. 2008); *State v. Williams*, 2016 ND 132, 881 N.W.2d 618

(2016); *Commonwealth v. Molina*, 459 Mass. 819, 948 N.E.2d 402 (2011); *Bordley v. State*, 205 Md. App. 692, 46 A.3d 1204 (2012); *People v. Hardy*, 77 A.D.3d 133, 907 N.Y.S.2d 244 (N.Y. 2010); *Johnson v. State*, 285 Ga. 571, 679 S.E.2d 340 (2009). *Banks* presents a similar situation to *Peoples* and *Tolbert*, where the clerk just handed a key and let the officers go to the room by themselves to affect the eviction despite his natural term of occupancy not having expired. *Banks* at 902. *Johnson* presents a fact pattern that is almost identical to this case, including the clerk going to the room with officers, smelling marijuana, unlocking the door but having the officers actually open it, and having the officers actually go into the room. *Johnson* at 340. Like with Appellee, Johnson's natural occupancy term had not expired. *Johnson* at 340-341.

In *Williams*, the trial court ruled, and the appellate court ultimately agreed, that in situations where law enforcement is called to effect an eviction, there is no "search incident," echoing Justice Kelly's dissent. *Williams* at 623; *Tilghman* at 469-470 (dissent). *Williams*' occupancy term had not yet expired. *Williams* at 620-621. The majority's holding conflicts with these other Courts' opinions finding the respective defendants' did not retain a privacy right in the hotel room after being evicted by the hotel. *See Banks* at 905, *Williams* at 624, *Molina* at 410, *Bordley* at 1218, *Hardy* at 141, and *Johnson* at 342. Their analyses are further supported by the *United States v. Haddad* holding in which the 9th Circuit Court of Appeals ruled that a defendant who had been evicted from a hotel room lawfully didn't even have standing to contest a

subsequent search of it by law enforcement. *United States v. Haddad*, 558 F.2d 968 (9th Cir. 1977).

The majority further attempts to distinguish the facts in this case from *Peoples* and *Tolbert* by erroneously focusing on the fact that Appellant had no notice prior to officers making entry. In doing so, it completely ignores that the defendant in *Peoples* was in Appellee's exact same position. *Peoples* at 995 (facts recited demonstrate no attempt to give defendant any eviction notice). Additionally, the *Williams* Court also deemed that the act of calling law enforcement to effect the eviction was "affirmative action that was a clear and unambiguous sign" that the hotel manager intended to evict the defendant. *Williams* at 621, 624. Williams was under arrest for another offense involving the same hotel's staff at the time, so no notice was provided to him. *Williams* at 621. The *Hardy* Court agrees: "Once the hotel possessed good cause to eject the defendant and the hotel employee took the affirmative step of contacting the police for their assistance in physically evicting the defendant, the defendant's expectation of privacy in the room was extinguished." *Hardy* at 140. No actual notice of eviction was provided to Hardy prior to law enforcement being summoned to effect the eviction. *Hardy* at 135-136. In *Molina*, the Court noted that the terms of occupancy for that hotel did not require notice prior to eviction. *Molina* at 409. While it could be argued that *Molina* is distinguishable from this case due to the hotel in this case having no occupancy terms (whereas the hotel in *Molina* did), there is nothing under Texas

law that requires a hotel to draft any such terms, or that requires a hotel to provide any notice to an occupant of a potential eviction. *See McBride,* 197 S.W.2d at 375. Notably, the *Molina* court discussed another factor that exists in Appellee's case: efforts to evade a run-in with hotel management. *Molina* at 409; 2 R.R. 15-16, 2 R.R. 33-35; SX1 at 1:13, 5:34-6:38. The *Molina* court correctly noted that:

> in terms of reasonable, objective societal expectations, *the touchstone of constitutional analysis*, the defendant could not have believed that his right to use the hotel room could not be permanently curtailed by management if the hotel became aware of a guest's criminal offense in a room. Nor could he have believed that management could be stymied from taking action if the defendant could evade a run-in with hotel management.

Id (emphasis added).

The majority opinion in this case would allow a defendant to engage in such evasive action in order to thwart any attempt at notice the majority is requiring. Neither notice nor the ability to thwart occupants' efforts to evade said notice are reasonable objective societal expectations of hotel staff generally. Nobody should expect hoteliers to have to risk physical danger to themselves and their guests to effectuate eviction notice and then actual eviction just to kick someone out of his hotel for engaging in criminal activity.

These Texas, other State, and Federal cases conflict with the lower court majority's holding. And while the State acknowledges that the out-of-state and Federal cases are merely persuasive authority, it should be noted that all of these courts from

at least 10 other jurisdictions (five Federal appellate courts, and five state courts) all analyzed this same issue and came to the opposite conclusion than the Third Court's majority. As Justice Kelly points out, "(t)he officers in this case, like the officers in *Peoples* and *Tolbert*, were evicting occupants at the request of hotel staff. As both parties discussed in oral argument, there is no Texas law requiring hotels to follow any procedure for eviction." *Tilghman,* at 471 (Kelly, J., dissenting). The hotel management was within its right to evict Appellee, and officers were legally present to assist the hotel, and, in so doing, did not violate Appellee's Fourth Amendment rights. The majority's opinion conflicts with Texas, other States', and Federal precedent, creates new hotelier regulations, and expands Fourth Amendment protections from what they are to what two Court of Appeals justices believe they should be.

CONCLUSION

This Court should reverse the majority opinion in this case, agree with the dissenting opinion, and uphold the Appellant's conviction. The majority ruling ignores facts that make *Stoner* inapplicable and, in so doing, erroneously expands *Stoner*'s scope from police-initiated hotel room searches to hotel-initiated evictions. The majority then imposes new, burdensome, and unworkable eviction notice rules not required by precedent or otherwise enacted by the Texas Legislature. In doing so, two

justices ignore guiding post-*Stoner* Texas, out-of-state, and Federal precedent that support the officers' lawful actions here.

PRAYER

The State prays that the Court overturn the Third Court of Appeals' ruling and rule that the trial court did not abuse its discretion in denying Appellee's motion to suppress. The State further prays that this Court will affirm the Appellee's conviction and sentence.

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P., RULE 9.4

I certify that this brief contains 3666 words,[8] exclusive of the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

Michael C. McCarthy
Asst. Criminal District Attorney

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief has been email-delivered to: Paul Evans on this the 2nd day of October, 2019.

Michael C. McCarthy
Asst. Criminal District Attorney

[8] A petition for discretionary review in the Court of Criminal Appeals must not exceed 4,500 words if computer-generated, and 15 pages if not. Tex. R. App. P. 9.4